

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

JULIO A. AMARILLA,
Petitioner,
vs.
BRIAN WILLIAMS, *et al.*,
Respondents.

3:10-cv-00412-HDM-VPC

ORDER

This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by a Nevada state prisoner.

Petitioner has filed a motion to proceed *in forma pauperis*. (Docket #4). Based on the information about petitioner's financial status, the Court finds that the motion to proceed *in forma pauperis* should be granted.

A petitioner must first present his grounds for relief to a state court before a federal court may review the merits of the issues he raises. To exhaust a claim, petitioner must have "fairly presented" that specific claim to the Supreme Court of Nevada. *See Picard v. Conner*, 404 U.S. 270,275-76 (1971); *Schwartzmiller v. Gardner*, 752 F.2d 1341, 1344 (9th Cir. 1984). A federal court cannot hear a mixed petition that contains both exhausted and unexhausted claims for habeas

1 corpus relief. *Rose v. Lundy*, 455 U.S. 509, 521-22 (1982); *Szeto v. Rusen*, 709 F.2d 1340, 1341
 2 (9th Cir. 1983). If a single one of the claims in the petition is unexhausted, the court is obliged to
 3 dismiss the petition for lack of exhaustion.

4 Upon reviewing the petition and attachments in this case, the Court concludes that
 5 petitioner's claims are unexhausted. Petitioner states that has filed a post-conviction habeas petition
 6 in state district court, but he has not presented the issues to the Nevada Supreme Court. (Petition, at
 7 p. 2; Attached State District Court Order). Because petitioner has not exhausted his grounds for
 8 relief in state court, this action shall be dismissed.

9 In order to proceed with any appeal, petitioner must receive a certificate of
 10 appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435
 11 F.3d 946, 950-951 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir.
 12 2001). Generally, a petitioner must make “a substantial showing of the denial of a constitutional
 13 right” to warrant a certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529
 14 U.S. 473, 483-84 (2000). “The petitioner must demonstrate that reasonable jurists would find the
 15 district court's assessment of the constitutional claims debatable or wrong.” *Id.* (*quoting Slack*, 529
 16 U.S. at 484). In order to meet this threshold inquiry, the petitioner has the burden of demonstrating
 17 that the issues are debatable among jurists of reason; that a court could resolve the issues differently;
 18 or that the questions are adequate to deserve encouragement to proceed further. *Id.*

19 Pursuant to the December 1, 2009 amendment to Rule 11 of the Rules Governing
 20 Section 2254 and 2255 Cases, district courts are required to rule on the certificate of appealability in
 21 the order disposing of a proceeding adversely to the petitioner or movant, rather than waiting for a
 22 notice of appeal and request for certificate of appealability to be filed. Rule 11(a). This Court has
 23 considered the issues raised by petitioner, with respect to whether they satisfy the standard for
 24 issuance of a certificate of appealability, and determines that none meet that standard. The Court
 25 will therefore deny petitioner a certificate of appealability.

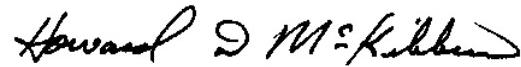
1 **IT IS THEREFORE ORDERED** that the application to proceed *in forma pauperis*
2 (Docket #4) is **GRANTED**. The Clerk **SHALL FILE** the petition for a writ of habeas corpus.

3 **IT IS FURTHER ORDERED** that petitioner's motion for the appointment of
4 counsel (Docket #5) is **DENIED**.

5 **IT IS FURTHER ORDERED** that this action is **DISMISSED WITHOUT**
6 **PREJUDICE** for failure to exhaust state court remedies. If and when petitioner exhausts his state
7 court remedies, he may file a new habeas petition in a new action. The Clerk shall enter judgment
8 accordingly.

9 **IT IS FURTHER ORDERED** that petitioner is **DENIED** a certificate of
10 appealability.

11 DATED this 10th day of August, 2010.

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13 UNITED STATES DISTRICT JUDGE

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